

Kildee

117718
DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

21041

FILE: B-203523

DATE: March 8, 1982

MATTER OF: Bilson International, Inc.

DIGEST:

Where protest alleging that specification is unduly restrictive is filed with contracting agency prior to bid opening date, opening bids without taking requested corrective action constitutes initial adverse agency action. In the absence of affirmative agency response to protester's request for postponement of bid opening, protester was on notice that bid opening would occur as scheduled. Therefore, subsequent protest to GAO filed more than ten working days thereafter is untimely. 4 C.F.R. § 21.2(a) (1981).

Bilson International, Inc. protests the cancellation of IFB No. 8FCB-B3-7002 issued by the General Services Administration to procure ear plugs for use by the Forest Service and other Federal agencies, and the resolicitation of the requirement under IFB No. 8FCB-B3-7002-A. We dismiss the protest as untimely.

Bilson asserts that although the original solicitation permitted bidders to furnish ear plugs made from either expandable foam or mineral fiber, the purchase description in the subsequent solicitation specified only expandable foam, which precluded consideration of Bilson's mineral fiber products. Bilson initially protested the restriction to GSA by letter of April 2, 1981. GSA acknowledged Bilson's protest on April 14 and then, on April 24, proceeded to bid opening as scheduled. Upon receiving GSA's letter of May 18, denying the protest, Bilson filed the subject protest with our Office. We believe that Bilson's protest is untimely.

GSA contends that Bilsom's protest should have been filed at GAO within ten working days of the April 24 bid opening because in instances where a protest is filed initially with the agency, our Bid Protest Procedures, 4 C.F.R. § 21.2(a) (1981), require filing with this Office within ten working days of actual or constructive notice of an agency's initial adverse action affecting the protester's rights,

Bilsom argues that timeliness should be measured from its receipt of GSA's letter of May 18 responding to that firm's April 2 protest, not the date of bid opening. Bilsom states that because its April 2 letter and other correspondence specifically requested GSA to refrain from opening bids, GSA was required to give Bilsom notice before taking the adverse action of opening bids. In the absence of such notice, Bilsom contends that it had a right to assume that GSA would postpone bid opening.

GSA's opening of bids as scheduled on April 24 in the face of Bilsom's April 2 protest constituted initial adverse agency action which, in effect, denied Bilsom's protest. Under our Procedures, Bilsom was thus required to file its protest within ten working days, Baxter & Sons Elevator Co., Inc., 60 Comp. Gen. 97 (1980), 80-2 CPD 414; Mid-Air Engines & Cylinders, Inc., B-203659, October 26, 1981, 81-2 CPD 341; Beelner & Thomas, B-202978, May 4, 1981, 81-1 CPD 341, reconsidered June 15, 1981, 81-1 CPD 487; 4 C.F.R. § 21.2(a). Neither the fact that Bilsom requested that bid opening be postponed nor the fact that the agency subsequently denied the protest by letter affected the protester's responsibility to conform to the filing requirements of section 21.2(a). See Bird-Johnson Company, B-199445, July 18, 1980, 80-2 CPD 49, reconsidered October 14, 1980, 80-2 CPD 275.

Here, in the absence of a reply to its letter of April 2 or other affirmative action on GSA's part, Bilsom had no reasonable basis to conclude that GSA had agreed to postpone bid opening. To the contrary, Bilsom had a copy of the solicitation and it should have assumed that bids would be opened as scheduled in that document unless it heard otherwise. In fact, the protester was given more time than indicated in the solicitation as the original bid opening date of April 9 was extended by amendment to April 24.

We do not think that Bilsom was "lulled" into believing that bid opening had been canceled or postponed in these circumstances; rather, we think Bilsom failed to act in a reasonable manner to protect its own interests. We believe that GSA's opening of bids on April 24 was the initial adverse action by which the timeliness of Bilsom's protest must be measured.

Since Bilsom's protest was not filed within ten working days after April 24, it is untimely under our Procedures and will not be considered on the merits.

The protest is dismissed.

Harry R. Van Cleve
Harry R. Van Cleve
Acting General Counsel